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No. 99-1179

In the Supreme Court of the United States

POWER ENGINEERING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in issuing a preliminary injunction pursuant to Section 3008(a) of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6928(a), requiring petitioners to provide financial assurances for proper closure and post closure care of their hazardous waste facility.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 191 F.3d 1224. The opinion of the district court (Pet. App. 75a-126a) is reported at 10 F. Supp. 2d 1145.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1999. The petition for a writ of certiorari was filed on December 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Resource Conservation Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, establishes a regulatory structure governing all aspects of hazardous waste management. 42 U.S.C. 6921-6939e (1994 & Supp. III 1997). One provision of the Act directs the Administrator of the Environmental Protection Agency (EPA) to establish "performance standards" for owners and operators of hazardous waste facilities. 42 U.S.C. 6924(a). The Act specifically identifies "financial responsibility (including financial responsibility for corrective action)," *ibid.*, as an area that EPA's performance standards should address.

If authorized by EPA, a State may carry out its own hazardous waste program in lieu of the federal program. 42 U.S.C. 6926(b). EPA has authorized Colorado to administer its own program, and as a result, the authorized Colorado regulations supplant federal regulations as requirements of RCRA. Pet. App. 12a & n.6. Under Colorado's authorized regulations, owners and operators of all hazardous waste facilities must comply with certain financial assurance requirements. 6 Colo. Code Regs. § 266.10 (1984) (CCR). Specifically, they must demonstrate that they have sufficient assets to provide for appropriate closure and post-closure care of their facilities, including required corrective action. CCR §§ 266.12, 266.13, 266.14. While the State has authority to enforce its regulatory requirements, EPA has independent authority under RCRA to enforce the authorized state requirements. 42 U.S.C. 6928, 6934, 6973. When EPA determines that a violation has occurred, it may file suit in "the United States district court in the district in which the violation occurred for

appropriate relief, including a temporary or permanent injunction." 42 U.S.C. 6928(a).

2. Since 1968, petitioners Power Engineering Company, Redoubt, Ltd., and Richard Lilienthal (the President of Power Engineering and the majority shareholder of both companies) have operated a metal finishing business in Denver, Colorado. Pet. App. 8a. Petitioners' operations generate thirteen waste streams and produce more than 1000 kilograms per month of hazardous waste, including arsenic, lead, mercury, and hexavalent chromium. Petitioners also store more than 6000 kilograms of hazardous waste per month at their facility. *Id.* at 9a.

In 1992, the Colorado Department of Public Health and the Environment (CDPHE) received a report that there were high levels of hexavalent chromium contamination of the surface water of the Lower South Platte River that could be traced to discharges from petitioners' facility. Pet. App. 9a. After learning of that contamination, CDPHE inspected petitioners' facility in August and September of 1992 and February and March of 1993. *Id.* at 9a-10a. The inspections revealed that petitioners were engaged in the unlawful treatment, storage, and disposal of hazardous waste. *Ibid.* As a result of petitioners' illegal activities, groundwater at, under, and near the facility is contaminated with levels of hexavalent chromium greatly exceeding established toxicity levels. *Ibid.* A plume of chromium contamination extends from petitioners' facility approximately 3310 feet into the South Platte Valley Fill Aquifer, which is connected to the South Platte River. *Id.* at 10a.

The CDPHE ordered petitioners to comply with certain requirements and assessed civil penalties. Pet. App. 10a. Petitioners complied with some parts of the

order, but not others, and they did not pay any portion of the civil penalty. *Ibid.* Petitioners have threatened to declare bankruptcy or abandon their facility rather than comply with their legal obligations. *Id.* at 20a, 122a. Petitioners have also engaged in a pattern of debt reduction and asset divestiture. *Id.* at 20a.

3. Dissatisfied with the lack of compliance by petitioners, the United States filed suit on behalf of EPA against them. Pet. App. 75a-76a. The United States' complaint alleged that petitioners violated RCRA by: (1) illegally treating, storing, and disposing of hazardous waste without a permit or interim status; (2) illegally shipping hazardous waste to a facility without a permit; (3) engaging in improper container management; (4) failing to provide employee training and failing to have a hazardous waste contingency plan; and (5) illegally operating a hazardous waste facility by failing to have a groundwater monitoring program, failing to minimize releases of hazardous waste, and failing to obtain and provide financial assurances. *Id.* at 76a. The United States sought a preliminary injunction under 42 U.S.C. 6928(a) directing petitioners to comply with the authorized state regulations governing financial responsibility and assurances.

After a hearing, the district court issued a preliminary injunction requiring petitioners to comply with the State's authorized financial responsibility requirements. Pet. App. 75a-128a. The court first held that petitioners own and operate a hazardous waste facility and are therefore subject to the State's authorized financial assurance requirements. *Id.* at 113a-118a. The court rejected petitioners' contention that the financial assurance requirements apply only to facilities that seek a permit. *Id.* at 118a. The court explained that "[w]hile [petitioners] accurately note that a facility

must provide financial assurances before a permit will issue, the financial assurance requirements attach regardless of whether a facility actually applies for a permit." *Ibid.*

The district court then ruled that the United States had established the prerequisites for obtaining a preliminary injunction. Pet. App. 119a-125a. The court specifically found that the United States had demonstrated "a substantial likelihood of success on the merits by compelling evidence" and that "a balancing of the equities" weighed in favor of requiring petitioners to comply with the financial assurance requirements. *Id.* at 125a. Finding that the amount of financial assurances required by RCRA is tied to the costs of remediation, *id.* at 95a, and that the costs associated with closure and post-closure care, including necessary remediation of the contaminated soil and groundwater at and near petitioners' facility, will be approximately $3.5 million, *id.* at 97a, the district court ordered petitioners to provide financial assurances in the amount of $3.5 million, *id.* at 126a.

4. The court of appeals affirmed. Pet. App. 1a-22a. The court first rejected petitioners' contention that the United States does not have authority to seek compliance with the financial assurance requirements independently of seeking compliance with the entire permitting scheme. *Id.* at 16a-17a. The court explained that EPA has authority under RCRA to seek a temporary or permanent injunction for a violation of "any" requirement, 42 U.S.C. 6928(a), and that the financial assurance requirements apply to owners and operators of "all hazardous waste facilities," 6 CCR § 266.10(a), not just those that have sought or have obtained a permit. Pet. App. 17-18a.

The court of appeals also rejected petitioners' argument that the district court's preliminary injunction was designed to obtain prejudgment security to enforce any future judgment, in excess of the district court's authority under Fed. R. Civ. P. 64. Pet. App. 18a-20a. The court noted that the district court had expressly directed petitioners "to provide financial assurances in accordance with" the State's authorized financial assurance requirements, indicating that "the requested assurances will be used for closure and post-closure costs." *Id.* at 20a. The court also rejected petitioners' contention that the district court's reliance on the costs of remediation as the basis for the amount of financial assurances showed that the district court was actually attempting to obtain prejudgment security to enforce a later remediation order. The court explained that the district court had properly associated the costs of remediation with closure and post-closure of the facility. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 7-10) that the district court lacked authority to issue a preliminary injunction requiring them to provide financial assurances for closure and post-closure activities. That contention is without merit and does not warrant further review.

RCRA authorizes EPA to commence a civil action "for appropriate relief, including a temporary or permanent injunction" for a violation of "any" RCRA requirement. 42 U.S.C. 6928(a)(1). The State's federally-authorized financial assurance standards are among the requirements that EPA may enforce. 42 U.S.C. 6924(t), 6926(b) and (d). Thus, as the court of appeals concluded, the United States had authority to seek, and the district court had authority to grant, a preliminary in-

junction requiring petitioners to comply with RCRA's financial assurance requirements.

Petitioners contend (Pet. 7 & n.2) that the obligation to provide financial assurances arises only in the context of an application for a permit. Since they have never sought a permit, petitioners argue, the district court lacked authority to order them to provide financial assurances. Petitioners' admitted failure to establish and maintain financial assurances, however, is an independent, free-standing violation of the authorized financial assurance requirements. As the court of appeals explained:

> Colorado's financial assurance requirements "apply to owners and operators of *all* hazardous waste facilities," and *inter alia* require "[a]n owner or operator of each facility . . . [to] establish financial assurances for closure, and if applicable, post-closure of the facility." C.C.R. §§ 266.10(a) & 266.14 (emphasis added). By their terms, these regulations apply to all owners and operators of hazardous waste facilities; they are not limited to permit holders or applicants.

Pet. App. 17a; see also *United States* v. *Ekco Housewares, Inc.*, 62 F.3d 806, 809, 812 (6th Cir. 1995) (facility is subject to RCRA regulations for financial assurance until final closure is certified even though facility never obtained interim status by applying for permit). The district court therefore had authority to order petitioners to provide financial assurances. Petitioners' failure to seek a permit as required by RCRA did not affect that authority.

Petitioners further contend (Pet. 8-9) that the district court premised its preliminary injunction on a finding that petitioners had illegally treated, stored, and dis-

posed of hazardous waste without a permit or interim status required by RCRA, and that an order directing petitioners to provide financial assurances exceeds the scope of that violation. The district court, however, premised its preliminary injunction on a finding that petitioners had failed to comply with the State's financial assurance requirements. Pet. App. 118a, 123a-124a. The preliminary injunction is precisely tailored to remedy that violation.

Petitioners also contend (Pet. 8-9) that the district court lacked authority to require financial assurances, because RCRA does not authorize a court to award prejudgment security for the costs of a judgment except as authorized by Rule 64 and the district court's order goes beyond the prejudgment security remedies that are authorized under Rule 64. The fallacy in petitioners' argument is that the district court did not award prejudgment security for the costs of a later judgment; it issued a preliminary injunction requiring petitioners to comply with their obligation under RCRA to provide financial assurances for closure and post-closure activities. Pet. App. 126a. That remedy is expressly authorized by RCRA. See 42 U.S.C. 6928(a). For similar reasons, the limitations set forth in the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3001 *et seq.*, have no application here. The United States is not seeking to collect on a debt; it is seeking to enforce petitioners' statutory obligation to provide the financial assurances necessary for their closure and post-closure activities.

Petitioners finally contend (Pet. 10-12) that the district court actually ordered prejudgment security, rather than compliance with RCRA's financial assurance requirements. That interpretation of the district court's order is incorrect. The district court ordered

petitioners "to provide financial assurance in the amount of $3,500,000 pursuant to 6 [CCR] § 266 and all applicable subparts." Pet. App. 126a. As the court of appeals explained, the plain terms of the order show that "the required assurances will be used for closure and post-closure costs." *Id.* at 20a. Nor does the district court's reliance (*id.* at 119a, 121a-122a) on petitioners' prior violations, their failure to comply with state remediation orders, their failure to pay civil penalties, their pattern of debt reduction and asset divestiture, and their threatened bankruptcy show that the district court intended for the money to be used to pay for the costs of the judgment rather than for closure and post-closure activities. The costs of closure and post-closure include the costs of remediation. As the court of appeals explained, "the district court properly considered remediation costs for the present contamination in calculating costs associated with financial assurances necessary, for the facility's closure or post-closure." *Id.* at 20a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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